IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Criminal Appeal No.281 of 2003.
Judgment reserved on:20.12.2006
Date of decision:12.01.2007

Vinod Kumar & Another. **….Appellants**

Versus

State of H.P. **….Respondent**

Coram

The Hon'ble Mr.Justice Surjit Singh, J.

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1]

For the Appellants: Mr.Anup Chitkara, Advocate.

For the Respondent: Mr.S.D. Vasudeva, Additional Advocate General with Mr.D.S. Nainta, Deputy Advocate General.

Dev Darshan Sud, J.

Both the appellants were charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (hereinafter referred to as the "Act") for conscious and exclusive possession of "Charas", weighing 8 Kgs. and 400 grams, which was recovered from their possession and stand convicted and sentenced by the trial Court.

The prosecution case in brief is that, on 9.10.2001 around 4.30 P.M. telephonic information was

---

[1] ***Whether reports of Local Papers may be allowed to see the judgment?***

received in the Police Station, Sadar, Mandi from the Police Post at Pandoh that a Maruti car bearing registration No.HP-01-0366, which was proceeding towards Mandi, did not stop on being signalled and sped away which aroused the suspicion of the police party. Sub Inspector Om Parkash (PW-14), who at the relevant time was posted at the Police Station, Sadar, Mandi, alongwith other officials namely ASI Rajinder Kumar, HC Ghamanda Ram, HHC Udai Chand, Constable Raj Kumar (PW-13) and Jwala Ram (PW-9), associating Shri Puran Chand (PW-3) and Joginder Singh, reached National Highway-21 to organize a Naka to apprehend the culprits. The check point (Naka) was set up at Bhiuli Bridge. Around 4.30 P.M., the offending vehicle was spotted coming from Kullu side it was got stopped and checked by the police personnel. It was being driven by the appellant Vinod Kumar while Jai Chand was sitting on the front seat alongside the driver. Both the appellants were given the option of search by a Gazetted Officer or Magistrate, which was duly recorded in Ex.PD and served upon the appellants. They opted for the search being conducted by a Gazetted Officer. In the meanwhile, SHO K.D. Sharma (PW-15) also reached the spot around 6.30 P.M. A search of the van was conducted and on checking the dicky (rear portion), 16 packets of polythene were recovered which, on opening, were smelling of “charas”. Weights and scale were arranged from PW-4

Jogider Singh, who is a shopkeeper at Bhiuli and it was found that the entire "charas", which was wrapped in 16 packets was 8.400 Kgs. According to this witness, out of three packets, small portion of "charas" was taken out and packed into two parcels of 50 grams each, which were sealed on the spot. The parcels were sealed with the impression "N". The residue was again resealed in a separate parcel with a seal which produced the impression "N". These three packets were taken into possession vide memo Ex.PC in which the weight of each packet was mentioned separately. After taking specimen seal impressions, the seal was handed over to PW-3 Puran chand. The Maruti Van, alongwith its documents, was taken into possession vide memo Ex.PF. First Information Report Ex.PA was recorded on the receipt of ruqua prepared by Sub Inspector Om Parkash (PW-14), Police Station, Sadar, Mandi District Mandi.

The First Information Report narrates in detail what has been stated hereinabove. It further records that PW-14 Om Parkash gave his personal search and thereafter the van was searched where 16 packets were found inside the dicky which, on opening smelt of "charas". It was weighed with an equipment arranged from PW-4 Joginder Singh. The weight and details of the packets is given which is as under:-

> (1) 600 grams, (2) 600 grams, (3) 600 grams, (4) 600 grams, (5) 450 grams,(6)

700 grams, (7) 500 grams, (8) 450 grams, (9) 500 grams, (10) 350 grams, (11) 500 grams, (12) 700 grams, (13) 350 grams, (14) 1000 grams, (15) 300 grams and (16) 200 grams.

Small quantity of "charas", being representative sample, was taken from each of the packets and re-packed into two packets weighing 50 grams each. The samples were sealed with the impression "N" and the remaining quantity of "charas" was also sealed in 13 seals of impression "N". After use, the seal was handed over to the witness Puran Chand. The "charas", and the van used in the offence, were taken into possession by a separate memo. The FIR records that Form NCB and Form-F were filled in on the spot. The sealed "charas" samples were sent to the HPCTL, Kandaghat for chemical analysis.

The other facts need not be discussed as the witnesses have corroborated each other in material particulars. Learned trial Court considered the entire evidence, oral as well as documentary, on the record. For this purpose, the learned trial Court referred to the direct evidence of PW-14 Sub Inspector Om Parkash, PW-15 Shri K.D. Sharma, SHO, Police Station, Sadar, Mandi, PW-5 Prem Chand, D.S.P., Sundernagar, PW-3 Puran Chand, who was one of the recovery witnesses and PW-4 Joginder Singh, relating to setting up of the Naka, stopping of the vehicle,

its search, preparation of the seizure memo, giving an option to the accused for being searched by a Gazetted Officer, weighing of the "charas", sealing of the samples, preparation of the site plan and held that the evidence on the record was sufficient to link the appellants with the recovery of the "charas" from them. Learned trial Court further held that the other evidence on record corroborated these facts. Reference was made to the testimony of PW-1 Ghanshyam ASI, PW-2 Mahesh Kumar, Photographer, who took photographs on the spot, PW-6 Mehar Chand Head Constable, PW-7 Constable Mohan Lal, who proved the First Information Report Ex.PG, PW-8 ASI Neel Chand, who was Reader to the Deputy Superintendent of Police, Mandi and who was handed over the Information Report Ex.PH, PW-9 Jawala Ram, who proved Exs.PH and PJ, PW-10, PW-10 Naresh Kumar, PW-11 Pawan Kumar, PW-16 Kuldip Singh, who was at Pandoh and had signalled the vehicle to stop, but it sped away towards Mandi and also the report of the Chemical Examiner. After consideration of the entire material on record, the learned Court held the case to be proved and sentenced the accused to rigorous imprisonment for ten years and fine of Rs.one lac each; in default of payment, to undergo further rigorous imprisonment for a period of four years each.

Learned counsel for the appellants has submitted that accused Vinod Kumar, appellant No.1 was driving the vehicle and no conscious possession, could

be attributed to him. According to him, the element of mensrea "conscious possession" was lacking in his case. The matter also stands concluded by a judgment of the Hon'ble Supreme Court in ***Madan Lal and Another vs. State of H.P. (2003)7 SCC 465,*** wherein it has been held:

> "Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were traveling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they traveled together from the same destination in a vehicle which was not a public vehicle."

In the present case, there is no evidence on record to show that appellant No.2 was not aware or was innocent about the possession of the "charas". We also cannot reach any other conclusion than that of conscious possession as reached by the learned trial Court.

In defence, two witnesses were produced by the accused. They are DW-1, a brother of the accused Vinod Kumar and DW-2 Maya Ram, who runs a tea stall at Pandoh. The statements of these two witnesses do not in any manner support the plea of the respondents that they had been framed in the matter. In answer to

question No.19 under Section 313 of the Code of Criminal Procedure, both the accused had denied their involvement in the offence and deposed that they had annoyed the police party by refusing a lift to them. On the face of it, this plea cannot be sustained.

Learned counsel for the appellants submits that it has not been established as to whether the "charas" allegedly seized by the police was sent for analyses to the Chemical Examiner or not. He has referred to the evidence of PW-15 SHO K.D. Sharma, PW-12 HC Nand Lal, PW-13 Raj Kumar and PW-3 Puran Chand to show and demonstrate that the evidence does not link the seized stuff with the material analysed. He further submits that the circumstance regarding the sending of specimen seal impression alongwith the samples to CTL was put to the accused in the statement under Section 313 Cr.P.C. Learned counsel has placed reliance on a number of judgments including judgment of this Court.

The judgments relied on by the learned counsel are from the High Court of Bombay in ***Mainuddin Kasim Mulla*** *vs.* ***State of Maharashtra, 1991 Drugs Cases 391*** and Rajasthan High Court in ***Kutabdeen*** *vs.* ***State of Rajasthan, 2001 Drugs Cases 532,*** wherein it has been held that proof of the Malkhana Register and non-identification of the sample sent for chemical analyses renders the case of the prosecution doubtful and the accused becomes entitled to acquittal. To the

similar effect is a decision of the Hon'ble Supreme Court in ***State of Rajasthan*** *vs.* ***Gopal, 1998 SCC (Cri) 1586*** wherein while dismissing the appeal filed by the State of Rajasthan, the Hon'ble Court was pleased to hold that the seizing of the sample was doubtful because the seal on the sample sent for chemical analyses could not be compared with the seized article kept in the police Malkhana. Learned counsel also placed reliance on ***Roshan Lal*** *vs.* ***State of H.P., Latest HLJ 2004 (HP) (DB) 968,*** to support his submission that when evidence on record is lacking on the point whether specimen of the seal used in sealing the samples or resealing them was sent to the analyst, the accused would be entitled to benefit of the doubt.

We are unable to agree with the submission made by the learned counsel for the appellants. The evidence on the record establishes beyond reasonable doubt that the samples had been sealed with the seal mark "N" (Ex.PC). The evidence of PW-4 Joginder Singh, PW-5 Prem Chand and PW-14 Om Parkash conclusively establishes the fact that the parcels were sealed with seal impression "N". The specimen seal impression Ex.PE which is proved by the testimony of PW-14, corroborates the report Ex.PN prepared by the Chemical Examiner, HPCTL, Kandaghat. The report states that samples, which were received through Raj Kumar (PW-13) in the Laboratory on 12.10.2001, were found to contain "charas". Certificate has also been

appended on the report Ex.PN to the effect that the seal on the sample tallied with specimen impression of the seal sent separately. This report and certificate have not been challenged. In the light of this evidence, it is difficult to accept the submission made on behalf of the appellants that the sample and the report do not stand connected with the seized charas recovered from the Maruti Van by which the appellants were travelling. The judgments relied upon by the learned counsel for the appellants are not applicable in view of the certificate appended on the report. If the appellants wanted to challenge the report (Ex.PN) of the Chemical Examiner, it was open to them to have summoned the said Examiner as a witness. Section 293 of the Code of Criminal Procedure, makes the report admissible in evidence. It is nobody's case that the report is not genuine. It is the weightage that should be given to the report, which is required to be considered.

The cumulative effect of the facts which have been placed on the record is that:

(a) the appellants had refused to stop at a check point when they were driving towards Mandi and on suspicion the police had to set up a Naka near Mandi and they were apprehended.

(b) Nothing has been brought on record to show that the search which was

conducted, was not in accordance with law. Seizure memo Ex.PC and the statements of the witnesses corroborate this seizure.

(c) The statements under Section 313 of the Code of Criminal Procedure, wherein a case has been set up by the appellants that they have been falsely implicated in the case, are not supported by any oral or documentary evidence on the record.

(d) The report of the Chemical Examiner under Section 293 of the Code of Criminal Procedure has remained unchallenged. It not only records that the samples which were brought by PW-13 contained "charas", but also that the seals were found to be intact and tallied with the specimen seal impressions received separately.

The Hon'ble Supreme Court in ***Bhupender Singh*** *vs.* ***State of Punjab, AIR 1988 SC 1011***, has held that Section 293 of the Code of Criminal Procedure provides that the report of the scientific experts may be used as evidence in any inquiry, trial or other proceedings of the Court. The report by itself is not crucial. It is a piece of evidence. The only protection to it

is that it does not require any formal proof. It is, however, open to the Court if it thinks fit to call the Chemical Examiner and examine him as to the subject matter of the report. This was the case where the Hon'ble Supreme Court was dealing with the report of the Chemical Examiner in case of death by poisoning.

In the present case, the report has remained unchallenged. The Hon'ble Jammu & Kashmir High Court in ***Parshotam Lal and Others vs. State, 2001 Cri.L.J.3378,*** has held that where the appellant does not exercise the option to summon the Chemical Examiner, the report can be admitted and relied upon in evidence. In these circumstances, the submission of the appellants deserves to be rejected.

Learned counsel appearing on behalf of the appellants further submitted that the learned trial Court was not correct in imposing the sentence of rigorous imprisonment of four years, in case of failure to pay a fine of Rs.one lac. He relies upon a judgment of this Court in ***Lekh Ram vs. State of Himachal Pradesh, Latest H.L.J. 2005 (HP) 118.*** We find force in this submission. We feel that the learned Special Judge was not right in imposing the sentence of four years rigorous imprisonment in case of default of payment of fine. We, accordingly, modify the sentence and order that in case of the appellants' failing to pay the fine, they shall

undergo imprisonment for six months each instead of four years.

In the result, the conviction of the appellants-accused for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, is maintained. However, the sentence of imprisonment in case of default to pay the fine is reduced to six months. The appeal is partly allowed to the extent indicated hereinabove.

(Dev Darshan Sud)
Judge

(Surjit Singh)
Judge.

January 12, 2007.
(aks)